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6                   UNITED STATES DISTRICT COURT  
7                   WESTERN DISTRICT OF WASHINGTON  
8                   AT SEATTLE

9                   OLAVONNE MORDHORST,

10                  Plaintiff,

11                  v.

12                  MICHAEL J. ASTRUE, Commissioner of the  
13                  Social Security Administration,

14                  Defendant.

15                  Case No. C10-5736-RSL-BAT

16                  **REPORT AND  
17                  RECOMMENDATION**

18                  Olavonne Mordourst seeks review of the denial of her Supplemental Security Income and  
19                  Disability Insurance Benefits applications. She argues the ALJ erred by (1) rejecting her  
20                  testimony that she needs to use a cane and has hypersomnia and (2) incorrectly finding that jobs  
21                  as a surveillance monitor exist in significant numbers in the national economy. *See* Opening  
22                  Brief, Dkt. 15 at 5-7. As discussed below, the Court recommends the case be **REVERSED** and  
23                  **REMANDED** for further administrative proceedings.

24                  **FACTUAL AND PROCEDURAL HISTORY**

25                  Ms. Mordhorst is currently 46 years old, attended college for two years, and worked as an  
26                  assistant restaurant manager, customer service clerk, and child care and home care provider. She  
27                  applied for benefits in 2007 alleging disability beginning December 31, 2001. The ALJ found

1 her not disabled after conducting a hearing on July 28, 2009. As the Appeals Council denied Ms.  
2 Mordhorst's request for review, the ALJ's decision is the Commissioner's final decision.

3 **ALJ'S DECISION**

4 Utilizing the five-step disability evaluation process,<sup>1</sup> the ALJ made the following  
5 findings:

6 **Step one:** Ms. Mordhorst had not worked since December 31, 2001.

7 **Step two:** Ms. Mordhorst's asthma, sleep apnea, left shoulder tendinitis, lymphedema  
8 and obesity are severe impairments.

9 **Step three:** These impairments did not meet the requirements of a listed impairment.<sup>2</sup>

10 **Residual Functional Capacity:** Ms. Mordhorst can perform sedentary work. She can  
11 walk or stand, with normal breaks, at least two hours but no more than six hours in an  
12 eight hour workday. She can sit six hours with normal breaks. She cannot climb ladders  
13 or scaffolds and can occasionally climb ramps, stairs, kneel, stoop or crouch. She has  
14 limited use of her nondominant left hand due to shoulder impairment that occasionally  
15 flares when she reaches. She must avoid fumes, odors, dusts and avoid work in poorly  
16 ventilated areas due to asthma.

17 **Step four:** Ms. Mordhorst cannot perform her past work.

18 **Step five:** As there are jobs Ms. Mordorst can perform she is not disabled.

19 Tr. 13-19.

20 **DISCUSSION**

21 **A. Whether the ALJ properly considered Ms. Mordhorst's testimony**

22 At the hearing before the ALJ, Ms. Mordhorst testified sleep apnea causes her to fall  
23 asleep for 20 to 30 minutes, three to four times a day<sup>3</sup> and that she has a cane<sup>4</sup> and sometimes  
uses a walker. Ms. Mordhorst argues the ALJ erred by failing to include these limitations in

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<sup>1</sup> 20 C.F.R. §§ 404.1520, 416.920.

<sup>2</sup> 20 C.F.R. Part 404, Subpart P, Appendix 1.

<sup>3</sup> Tr. 32-33.

<sup>4</sup> Tr. 34.

1 assessing her residual functional capacity. Dkt. 15 at 5. The Commissioner contends the ALJ  
2 properly discounted Ms. Mordhorst's testimony as inconsistent with other statements she has  
3 made, and inconsistent with the medical evidence. Dkt. 16 at 6.

4 The ALJ did not find Ms. Mordhorst was malingering and thus was required to give clear  
5 and convincing reasons to reject her testimony about the severity of her symptoms. *Smolen v.*  
6 *Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996). In this case, the ALJ properly discounted Ms.  
7 Mordhorst's testimony about needing a cane but erred in rejecting her testimony about  
8 hypersomnia.

9 The ALJ did not specifically articulate why he did not believe Ms. Mordhorst's testimony  
10 about hypersomnia. It appears the ALJ believed the medical evidence did not support her  
11 testimony. As the decision states:

12 The claimant also reported difficulty sleeping and indicated that  
13 she was hypersomnolent during the day. Dr. Brown noted that the  
14 claimant kept trying to fall asleep during the history. Dr. Brown  
assessed severe asthma with allergic non-allergic components, and  
sleep apnea by history but her hypersomnolent state would suggest  
the likelihood of the same.

15 Tr. 14. This suggests the ALJ viewed Ms. Mordhorst's claims of hypersomnia as unsupported  
16 by objective medical evidence, based solely on her statements, and thus not credible. The  
17 medical record, however, does not support this view. The ALJ mentions Ms. Mordhorst  
18 underwent an overnight polysomnogram which established she has "severe obstructive sleep  
19 apnea." Tr. 14. But what the ALJ fails to mention is this same overnight study indicated "[t]his  
20 patient has a profound problem with hypoxia, as well as obstructive sleep apnea. The obstructive  
21 sleep apnea observed may result in daytime sleepiness." Tr. 300. Hence, there is medical  
22 evidence that supports Ms. Mordhorst's testimony about daytime sleepiness.  
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1       The ALJ's error in rejecting Ms. Mordhorst's testimony for lack of medical evidence is  
 2 not harmless in light of the vocational expert's testimony that Ms. Mordhorst would not be able  
 3 to work as a surveillance monitor if she fell asleep several times a day. Tr. 45. At this point, the  
 4 Court cannot say whether hypersomnia renders Ms. Mordhorst disabled or not. While there is  
 5 some medical evidence to support Ms. Mordhorst's hypersomnia claims, it is not well  
 6 developed.<sup>5</sup> Consequently, the case should be remanded for further proceedings, rather than for  
 7 an award of benefits.

8           Although the ALJ erred in rejecting Ms. Mordhorst's testimony about hypersomnia, he  
 9 properly rejected her claims about needing a cane or walker. First, Ms. Mordhorst's testimony  
 10 about needing a cane or walker is inconsistent with the statement she gave in her adult function  
 11 report that she did not use a cane or a walker. Tr. 131. Second, it is also inconsistent with her  
 12 testimony that five years after her alleged disability onset date, she worked part-time in adult  
 13 home care and in daycare—activities that do not square with the need to use a walker. Tr. 24.  
 14 And third, no doctor or lay witness indicated Ms. Mordhorst used or needed to use a cane or  
 15 walker.

16           The Court recognizes that as Ms. Mordhorst is 5' 3", weighs over 270 pounds and has  
 17 heart and pulmonary problems, it would be reasonable to believe she needs a cane or walker.  
 18 However, where, as here, the ALJ provides a rational interpretation of the evidence, this Court  
 19 must uphold it. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). Additionally, the ALJ  
 20 found Ms. Mordhorst could perform work as a surveillance monitor. The vocational expert

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21           <sup>5</sup> The overnight study raising concerns about daytime sleepiness was conducted in 2006. The  
 22 study stated Ms. Mordhorst's sleep apnea "may" cause sleepiness, not that it does cause  
 23 sleepiness. Additionally, it is unclear whether Ms. Mordhorst's sleepiness is treatable, and has  
 improved or worsened since the study. Without further development, it cannot be determined  
 whether hypersomnia renders Ms. Mordhorst disabled.

1 testified this job involves sitting and watching a monitor. Tr. 42. Hence, even if Ms. Mordhorst  
2 needs to use a cane, she would be able to perform this job and any error would be harmless.

3 **B. Whether the ALJ properly found there are jobs Ms. Mordhorst can perform**

4 Dr. Joseph Moisan, a rehabilitation counselor and case manager, and vocational  
5 consultant, testified as a vocational expert. Tr. 39. He testified Ms. Mordhorst could work as a  
6 surveillance systems monitor, a job that would require her to sit in front of a monitor in  
7 department stores, casinos or companies that provide home security monitoring; he testified there  
8 are 58,000 such jobs nationally and 2,730 in Washington State. Tr. 42. Taking into account Ms.  
9 Mordhorst's need for a relatively clean work environment, Dr. Moison estimated, based on his  
10 personal experience visiting employers, that one-half of the jobs nationally would meet Ms.  
11 Mordhorst's needs. *Id.* at 43.

12 Ms. Mordhorst argues because Dr. Moison's opinion is based on his experience, he  
13 provided insufficient "data regarding how many of these jobs at which Ms. Mordhorst would be  
14 able to maintain employment due to environmental concerns, [and] it was error for the ALJ to  
15 determine that Ms. Mordhorst was employable at this job." Dkt. 15 at 6. The Court rejects this  
16 argument.

17 First, Dr. Moison appears qualified to give expert testimony and Ms. Mordhorst does not  
18 argue otherwise. As an expert, he may render opinions based on his experience. Indeed,  
19 experience is one of the recognized grounds to qualify a witness as an expert. *See Fed. R. Evid.*  
20 702. Hence, there is no reason to discount Dr. Moison's opinion that, based on his experience  
21 visiting employers, one-half of the surveillance jobs would meet Ms. Mordhorst's needs simply  
22 because he was relying on his experience.

23 Second, Ms. Mordhorst argues Dr. Moison's opinion is not "quantified by the Dictionary

1 of Occupational Titles.” Dkt. 15 at 6. This argument is made without discussion or supporting  
2 authority and Ms. Mordhorst points to nothing in the DOT that undermines Dr. Mosion’s  
3 opinion.

4 And third, Ms. Mordhorst’s argument implies there are not enough surveillance jobs that  
5 meet her needs and thus she is disabled. Whether there are a significant number of jobs a  
6 claimant is able to perform with her limitations is a question of fact to be determined by a  
7 judicial officer. The existence of two “isolated jobs” is not adequate to support a finding that  
8 there is a significant number of jobs the claimant is able to perform. *Walker v. Matthews*, 546  
9 F.2d 814, 820 (9th Cir. 1976). However, Dr. Moison estimated 29,000 jobs nationally and 1,365  
10 jobs in Washington State met Ms. Mordhorst’s limitations. Hence, this is not a case involving  
11 “isolated jobs that exist only in very limited numbers in relatively few locations outside of the  
12 region where you live.” 20 C.F.R. § 404.1566(b). The ALJ thus did not err in finding there exist  
13 in significant numbers, surveillance systems monitor jobs that meet Ms. Mordhorst’s limitations.

14 **CONCLUSION**

15 For the foregoing reasons, the Court recommends that the Commissioner’s decision be  
16 **REVERSED** and the case be **REMANDED** for further administrative proceedings. On remand,  
17 the ALJ should (1) further develop the medical evidence regarding Ms. Mordorst’s hypersomnia;  
18 (2) reevaluate the medical opinions in the record regarding hypersomnia; (3) reevaluate Ms.  
19 Mordhorst’s RFC as necessary; and (4) reassess, as necessary, steps four and five of the  
20 sequential evaluation process with the assistance of a vocational expert if deemed appropriate. A

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1 proposed order accompanies this Report and Recommendation.

2 DATED this 6th day of May, 2011.

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6 BRIAN A. TSUCHIDA  
7 United States Magistrate Judge

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